

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Request for Review of Decision of the)	
Universal Service Administrator by)	WC Docket No. 06-122
deltathree, Inc.)	

**REQUEST FOR REVIEW OF DECISION OF THE UNIVERSAL SERVICE
ADMINISTRATOR BY DELTATHREE, INC.**

I. INTRODUCTION AND SUMMARY

deltathree, Inc. (“deltathree” or the “Company”), through its undersigned counsel, hereby requests the reversal of the Letter Decision of the Universal Service Administrative Company (“USAC”) of April 29, 2010 (the “Letter Decision”)¹, in which USAC denied deltathree’s appeal of the invoices issued in the first quarter 2010 and the Company’s request for USAC to cancel all processing of the revised 499-Q forms submitted in October 2009 and credit deltathree for the adjustments. Further, the Company requests that USAC’s denial of the Company’s request for alternative relief (that the revised Forms 499-Q submitted in October 2009 be cancelled) be reversed for failing to respond to the relief sought.

II. SUMMARY OF FACTS

For the time period of November 2008 through August 2009, USAC prepared estimated 499-Q forms for deltathree. The relevant invoices for Universal Service Fund (“USF”) contributions for deltathree during 2009 were based upon those estimated forms. On October 27, 2009, deltathree prepared and submitted revised forms for that time period, including the

¹ Letter from USAC to Mr. Doug Orvis, dated April 29, 2010, attached hereto as Exhibit A.

November 2008, and February, May and August 2009 499-Q forms. These forms were incorrectly identified by deltathree's regulatory consultant as original forms, but technically were actually revisions, based on USAC's internal guidelines that consider the estimates created by USAC to be "original forms" under the Commission's rules (including the rule prohibiting revisions to Form 499-Q after 45 days from the date they are filed).² Unfortunately, while completing the forms deltathree made a reporting error which resulted in a substantial overstatement of its contribution base for the entirety of 2009 and *grossly* overstated the applicable revenue subject to USF contributions. These reporting errors resulted in the issuance of first quarter 2010 invoices which exceed the Company's current and accurate USF contribution to such an extent that it is greater than two and a half years worth of actual contributions, based on historic data. Further, the amount billed constitutes an amount in excess of the amount of cash on hand that the Company has available.

On April 29, 2010, USAC issued a Letter Decision that denied deltathree's appeal. The Letter Decision stated that (i) no FCC regulation prohibited USAC from processing an upward revision of a Form 499-Q after 45 days had elapsed, thus USAC was justified in creating and employing a "one-way" revision rule that would permit upward revisions of the Form 499-Q at any time, and that only downward revisions were covered by the 45 day Form 499-Q rule; and (ii) USAC lacked the authority to revise deltathree's Forms 499-Q after the 45-day revision deadline and that it would not permit the cancellation of the filings under that authority. As outlined below, USAC's first conclusion is incorrect under FCC precedent, and relies on a biased and inaccurate reading of the FCC's precedent in this area. The second, alternative decision rendered by USAC actually denied relief that was not sought and failed to address the request

² This fact was confirmed to deltathree's counsel through a email correspondence with Michelle Garber, Director of Financial Operations at USAC.

that deltathree had made. The Company requested that these revised forms be declared void; it did not ask that USAC accept further revised forms. Rather, the Company asked that USAC cancel the revision, and instead use the original USAC estimates, which is clearly within USAC's power.

III. APPEAL OF DECISION OF THE UNIVERSAL SERVICE ADMINISTRATOR

USAC's decision is incorrect on two fronts. First, USAC misapplied FCC precedent, leading to the incorrect conclusion that the revised forms submitted by deltathree could legally be accepted for processing. Second, USAC misinterpreted deltathree's request for the cancellation of the revised forms by treating it as a request to provide further revised forms - something that deltathree cannot do under Commission precedent, thus denying deltathree a legitimate request within USAC's authority as the administrator of the USF. We discuss each of these two errors in turn.

A. USAC Erred in Accepting and Processing the Late-Filed Revised 499-Q Filings

USAC's fundamental error was the accepting of revised Form 499-Q filings on October 29, 2009, after the 45 day deadline for revisions had past for the forms. In communications with USAC staff, the staff indicated that it was USAC's procedure to apply the Form 499-A one-way revision rules to the Form 499-Q as well (even though the FCC had never stated that the rule applied to both the Form 499-Q), and thus created a policy of accepting upward revisions of the Form 499-Q at any time even though the Commission had never adopted such a policy. Such a one-way revision rule applies only to Form 499-A filings, not Form 499-Q filings. As deltathree explained in the appeal to USAC, FCC regulations prohibit the revision of all Form 499-Q filings

more than 45 days after the forms are filed.³ This prohibition is clearly intended to be absolute and not merely a one-way, downward revision only, rule, as USAC states in its Letter Decision.

The estimated forms prepared and relied upon by USAC from November 2008 through August 2009 provided the basis for issuing the original USF invoices to the Company during that time period, and thus constitute the original 499-Qs for deltathree. The forms that were filed by deltathree in October 2009 – more than 45 days after the filing date of the original forms – therefore operated as revisions of the estimated forms that were already processed by USAC and thus should never have been accepted by USAC. Commission precedent makes clear that this is absolute and not merely a one-way ratchet. In establishing the 45 day rule, the Commission found that limiting revisions to the 499-Q filing was “necessary to eliminate incentives for contributors to revise their revenue projections after the announcement of the contribution factor for the upcoming quarter in order to reduce their contribution obligations and to otherwise reduce the likelihood of a shortfall in universal service funding in a given calendar quarter.”⁴ The Commission further described this revision period as an “opportunity to correct their projections,”⁵ and not merely as an opportunity to reduce their projections. As noted further below, this distinction is completely logical, as the USF contribution rate is set, in part, based on revenue projections provided. If carriers could revise their forms – either up or down – after the contribution rate is set, then contribution rate would potentially be incorrect – either too low or too high – causing the fund to over-collect or under-collect in the following quarter.

Moreover, the underlying revision policy for the Form 499-A is based on an entirely different set of policy criteria. When the FCC established the Form 499-A revision policy, it did

³ *Federal-State Joint Board on Universal Service*, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 02-329, 17 FCC Rcd 24952, (“*Interim Contribution Order*”) at ¶ 36 (2002).

⁴ *Id.*

⁵ *Id.*

so to provide USAC with some finality in its books after the passage of time.⁶ By contrast, the Form 499-Q revision rule was created in order to prevent arbitrage of the USF system by carriers raising or lowering projections after the release of the quarterly contribution factor.⁷ If carriers could revise their Form 499-A downward many years after the filing, the fund would always have some uncertainty as to its finances. There is no such concern with the Form 499-Q calculations because the system is self-funding every quarter.⁸ Any additional quarterly contributions received from deltathree as a result of the revised forms will simply be refunded to the Company during the annual true-up period, a fact readily conceded by USAC.⁹ Because the limitations the Commission provided on revisions to the Form 499-A serve different purposes than the limitations provided to revise the Form 499-Q, it is not appropriate for USAC to rely on the Form 499-A rule to create a similar 499-Q policy, especially where such policies conflict with Commission precedent. As such, under both FCC regulations and policy, the revised forms submitted in October 2009 should have properly been rejected by USAC.

As further evidence that the Commission has intended different rules to be in effect for the revisions of the Form 499-Q and Form 499-A, the instructions for each form provide different guidance for carriers. The Form 499-A revision rule was placed into the Form 499-A instructions with a specific notation that carriers must file revisions that “would result in decreased contributions” by March 31 of the following year.¹⁰ By contrast, the Form 499-Q instructions state plainly that “revised filings must be made with 45 calendar days of the original

⁶ See *Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review - Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, Order, 20 FCC Rcd 1012, ¶ 10 (Wireline Comp. Bur. Dec. 9, 2004) (holding that a 12-month deadline for downward revisions would “improve the integrity of the universal service support mechanisms” and “reduce substantially the need for adjustments regarding a given contribution year, providing certainty to contributors and their customers”).

⁷ *Interim Contribution Order*, at ¶ 36.

⁸ 47 C.F.R. § 54.709.

⁹ *Letter Decision*, at 5.

¹⁰ Form 499-A, instructions at 12.

filing date.”¹¹ There is no equivocation of the Form 499-Q instructions, as it simply refers to “revised filings,” and not “revised filings that would result in decreased contributions” or any other language that would indicate that such a one-way policy exists as it does in the 499-A. The different language, which exists today in the Form 499-Q, is evidence that the Commission indeed has different rules for revisions to both the Form 499-Q and the Form 499-A.

By reading into the Form 499-Q instructions a “one way” revision rule, USAC is not only contradicting Commission precedent but making policy in violation of its limited authority as the administrator. While USAC has the authority to create its own internal procedures and processing guidelines, it does not have the authority to act contrary to FCC regulations or the Form 499-A or Form 499-Q instructions. Only the Commission can implement policies concerning the universal service program.¹² Therefore, USAC was required to act in accordance with FCC regulations as embodied, in part, by the precedent and the Form 499-Q instructions and reject the revised 499-Q forms, regardless of whether they were increases or decreases in contribution as indicated on the original forms. Accepting the forms in contradiction of the absolute FCC ban on Form 499-Q revisions after 45 days exceeded USAC’s authority as administrator.

B. USAC has the Authority to Reject Clearly Erroneous Projections

In the appeal to USAC, deltathree requested that USAC reject the revisions filed in October 2009. USAC did not respond to this request, but instead stated that it could not accept downward revisions after 45 days.¹³ This answer was not responsive to deltathree’s request, and

¹¹ Form 499-Q, instructions at 11.

¹² 47 U.S.C. § 254.

¹³ *Letter Decision*, at 5.

simply provided the answer to a different, previously answered question, specifically whether USAC could accept a Form 499-Q revision after the passage of 45 days.

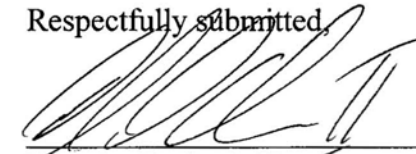
By ignoring deltathree's actual request, USAC ignored the fact that it is not only within USAC's authority to reject or cancel filed worksheets but that it is a power it routinely exercises. USAC routinely rejects worksheets for filing when they are patently incorrect, as they were in this instance. When deltathree filed its revised worksheets in October 2009, it included in its contribution base projections that were clearly incorrect, a fact that would have been readily apparent to USAC by simply referencing the other Forms filed simultaneously. For instance, the August 2009 Form 499-A (correctly filed) included actual revenue from the time period incorrectly projected in the February 2009 Form. USAC made no outreach to deltathree to determine if these forms were accurate or to understand the clear discrepancies. Rather than exercise its authority as administrator to reject or correct filing with clear mistakes, USAC chose to exercise willful blindness towards these filings and simply process them without any further inquiry into the accuracy of the forms. Because USAC has the authority to reject Forms, its determination that it cannot accept a late-filed revisions in response to deltathree's request to cancel the forms should be given no weight, as it failed to respond to the request that was made.

IV. CONCLUSION

Therefore, deltathree respectfully requests that the Commission reverse USAC's April 29, 2010, Letter Decision and direct USAC to cancel the Form 499-Q revisions filed in October

2009 as being untimely filed. In the alternative, deltathree requests that USAC be directed that it does have the authority to cancel filed Forms upon request.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. Orvis II', is written over a horizontal line.

Douglas D. Orvis II

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Counsel for deltathree, Inc.

Dated: May 27, 2010

Exhibit List

Exhibit A

USAC Letter Decision of April 29, 2010

Exhibit B

Declaration of Ziv Zviel

Exhibit A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Request for Review of Decision of the)	WCB Docket No. 06-122
Universal Service Administrator by)	
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DECLARATION OF ZIV ZVIEL

1. My name is Ziv Zviel. I am the Chief Financial Officer and Treasurer of deltathree, Inc. ("deltathree", or the "Company"). My business address is deltathree, Inc., 224 West 35th Street, Suite 1004, New York, New York, 10001.

2. I have been the CFO and Treasurer of deltathree since 2009. Prior to that I was Vice President of Finance at Live Person, Inc. and held several positions in the finance department at a software company. In addition, I was formerly an Audit Manager in the technology practice group at Kost, Forer Gabbay and Kasierer, a member firm of Ernst & Young International.

3. I am authorized to make this declaration on behalf of deltathree.

4. I provide this declaration in support of the above-captioned appeal. I make all statements in this declaration based upon my personal knowledge and my review of records maintained in the ordinary course of business and prepared in anticipation of this appeal, and all facts stated herein are true and correct to the best of my knowledge.

5. As CFO, I am responsible for the preparation of deltathree's financial reports for the company, investors and regulatory agencies.

6. Our Forms 499-A and 499-Q are prepared by deltathree together with our

regulatory consulting company, Technologies Management, Inc.

7. On October 27, 2009, deltathree, through its regulatory consultant, prepared and submitted Forms 499-Qs for November 2008, February 2009, May 2009 and August 2009 to the Universal Service Administrative Company.

8. Prior to filing these forms, USAC had prepared estimated forms for deltathree and invoiced deltathree based on these estimates.

9. The forms filed in October 2009 vastly overstated deltathree's projected end user revenue for the periods in question.

10. The October 2009 forms were processed by USAC as revisions to the estimated forms that USAC had previously prepared.

11. The invoices sent to deltathree by USAC in the first quarter 2010 contained adjustments for the previous quarters affected by the October 2009 filings.

12. The invoices sent to deltathree in the first quarter 2010 were more than two and half years of contributions based on the Company's collected end user revenue.

13. The invoices sent to deltathree in the first quarter 2010 exceeds the Company's cash on hand.

I affirm under penalty of perjury that the foregoing is true and correct.

Ziv Zviel, May 27 2010
Ziv Zviel
Chief Financial Officer and Treasurer, deltathree, Inc.

Exhibit B



**Administrator's Decision on Contributor Request for Review and Revision
of USF Contribution Invoice Issued on January 22, 2010**

By Certified & Electronic Mail

April 29, 2010

Mr. Doug Orvis
Bingham McCutchen LLP
2020 K Street, NW
Washington, DC 20006-1806

Re: deltathree (Filer ID 826021) Letter of Appeal dated February 18, 2010

Dear Mr. Orvis:

The Universal Service Administrative Company (USAC) has completed its evaluation of the request you submitted on behalf of deltathree, Inc., on February 18, 2010, for review and revision of the Universal Service Fund (USF) contribution invoice issued to deltathree on January 22, 2010. The request concerns USAC's acceptance of deltathree's four late filed Form 499-Qs that were due November 1, 2008, and the first business day of February, May and August 2009. All four Form 499-Qs were accepted outside the 45-day revision deadline because they were upward revisions. deltathree argues that USAC should reject, or alternatively cancel processing of, the upwardly revised forms because the forms were filed outside the Form 499-Q 45-day revision window. As discussed in more detail below, USAC hereby denies deltathree's request.

Decision on Request by deltathree: Denied

Discussion

Federal Communications Commission (FCC or Commission) regulations require telecommunications carriers to file an annual FCC Form 499-A. In addition, carriers are also required to file quarterly Form 499-Qs, unless they meet the *de minimis* exemption.¹

¹ See 47 C.F.R. § 54.706(a) ("Entities that provide interstate telecommunications to the public or to such classes of users as to be effectively available to the public, for a fee will be considered telecommunications carriers providing interstate telecommunications services and must contribute to the universal service support mechanisms"); See also, 47 C.F.R. § 54.711(a) ("The Telecommunications Reporting Worksheet sets forth information that the contributor must submit to the Administrator on a quarterly and annual basis."); 47 C.F.R. § 54.708 (Providing an exemption from the reporting requirements of Section 54.711(a) only if the "...contributor's contribution to universal service in any given year is less than \$10,000 that contributor will not be required to submit a contribution or Telecommunications Reporting Worksheet for that year unless it is required to do so by our rules governing Telecommunications Relay Service,

USAC relies on projected revenue for the upcoming quarter reported on the Form 499-Q to bill contributors and relies on the annual Form 499-A to reconcile billings for the previous year, as projected on the Form 499-Qs. *See generally*, 47 C.F.R. Part 54.

The FCC requires Form 499-Qs to be filed on the first business day of the following months: November, February, May and August. The November Form 499-Q is used to determine a company's monthly Universal Service Fund (USF) contribution obligation for January, February and March of the next calendar year; the February Form 499-Q is used to determine a company's monthly USF contribution obligation for April, May and June of the calendar year; the May Form 499-Q is used to determine a company's monthly USF contribution obligation for July, August and September of the calendar year; and the August Form 499-Q is used to determine a company's monthly USF contribution obligation for October, November and December of the calendar year.²

If a filer fails to submit a form, USAC must bill the contributor based on the relevant data available to USAC.³ To accomplish this requirement, USAC prepares the missing form, on behalf of the filer, and estimates the filer's revenue for the period covered by the missing form.⁴ USAC's estimate is based on previous Form 499-A submissions. If a filer then submits the missing form, USAC considers the filer submitted form a revision to the form completed by USAC. If the submitted form is outside the 45-day revision window, USAC will only accept the filing if it is an upward revision to the initial form containing the USAC estimated revenue.

USAC records indicate that deltathree did not submit the November 2008, February 2009, May 2009 and August 2009 Form 499-Qs by the required deadlines. Consistent with the aforementioned procedure, USAC prepared the Form 499-Qs for each quarter estimating deltathree's projected revenue for the respective upcoming quarters. Based on the estimates, USAC invoiced deltathree for its contribution obligation to the USF. On October 27, 2009, deltathree submitted the four missing Form 499-Qs, which reported revenue higher than USAC's estimates. USAC accepted the forms, which were submitted outside the 45-day revision window, as upward revisions to the forms prepared by USAC for deltathree.

deltathree states that the revised Form 499-Qs grossly overstated its revenue, and requests that USAC cancel the processing of the revised Form 499-Qs and credit deltathree for the adjustments that posted on the January, February and March 2010 invoices. deltathree argues that USAC should have rejected the forms it submitted because the FCC's rules

numbering administration, or shared costs of local number portability.") We note that regulations governing the Telecommunications Relay Service requires all interstate telecommunications service providers to file at least an annual Telecommunications Reporting Worksheet (FCC Form 499-A). 47 C.F.R. § 64.604(c)(5)(iii)(A-B). Regulations governing local number portability and number administration require all telecommunications carriers providing service in the United States to complete a FCC Form 499-A. 47 C.F.R. §§ 52.32(b) and 52.17(b).

² *See Federal-State Joint Board on Universal Service, Petition for Reconsideration filed by AT&T, CC Docket No. 96-45, Report and Order and Order on Reconsideration, FCC 01-85, 16 FCC Rcd. 5748 (2001).*

³ 47 C.F.R. § 54.709(d).

⁴ *See* USAC website at <http://www.usac.org/fund-administration/contributors/revenue-reporting/estimated-revenue.aspx>. *See also*, 47 C.F.R. § 54.709(d).

prohibit any revisions outside the 45-day revision window.

No Regulatory Prohibition Exists on Accepting Upwardly Revised Form 499-Qs Outside the 45-Day Downward Revision Deadline

The FCC has stated that timely filing of the FCC Form 499 is an essential administrative requirement that serves the public interest, and which the FCC relies upon in order to determine the quarterly USF contribution factor.⁵ The FCC established a 45-day revision window to give contributors an opportunity to revise their quarterly forms while adequately maintaining appropriate USF funding in a given quarter.⁶ In all cases, it is the contributor's obligation to ensure filings are made in a timely and accurate manner.⁷

The FCC stated in the *Interim Contribution Methodology Order* that the purpose of the 45-day revision window is to:

eliminate incentives for contributors to revise their revenue projections after the announcement of the contribution factor for the upcoming quarter in order to *reduce* their contribution obligations and to otherwise *reduce* the likelihood of a shortfall in the universal service funding in a given calendar year (emphasis added).⁸

⁵ *In the Matter of Request for Review by Atlantic Digital, Inc. of Decision of Universal Service Administrator*, CC Docket No. 96-45, Order, DA 05-520, 20 FCC Rcd. 4224, 4225-26, ¶¶ 3, 5 (2005).

⁶ *See Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review-Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource Optimization, Telephone Number Portability, Truth-in-Billing and Billing Format*, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 02-329, 17 FCC Rcd 24952, ¶ 36 (2002) (*Interim Contribution Methodology Order*).

⁷ When an entity subject to USF reporting requirements (*see* 47 C.F.R. §54.706) files a Form 499-Q, an officer of the filing entity by signing the form states: "I certify that I am an officer of the above-named reporting entity, that I have examined the foregoing report and to the best of my knowledge, information and belief, all statements of fact contained in this Worksheet are true, that said Worksheet is an accurate statement of the affairs of the above-named company for the quarter and that the projections of gross-billed and collected revenues represent a good-faith estimate based on company procedures and policies." The certification language on the Form 499-A states: "I certify that I am an officer of the above-named reporting entity as defined on page [...] of the instructions, that I have examined the foregoing report and, to the best of my knowledge, information and belief, all statements of fact contained in this Worksheet are true and that said Worksheet is an accurate statement of the affairs of the above-named company for the previous calendar year. In addition, I swear, under penalty of perjury, that all requested identification registration information has been provided and is accurate. If the above-named reporting entity is filing on a consolidated basis, I certify that this filing incorporates all of the revenues for the consolidated entities for the entire year and that the filer adhered to and continues to meet the conditions set forth in Section II-B of the instructions."

⁸ *Interim Contribution Methodology Order*, ¶ 36. *See also, Federal-State Joint Board on Universal Service, Request for Review by: ABS-CBN Telecom North America, Inc. of Decision of Universal Service Administrator; Southwest Communications, Inc. of Decision of Universal Service Administrator; and Trans National Communications International, Inc., Decision of Universal Service Administrator*, CC Docket No. 96-45, Order, DA-07-1276, 22 FCC Rcd 4965, ¶ 2 (2007).

Thus the FCC is prohibiting the downward revision of revenue information on the Form 499-Q outside the 45-day revision period to reduce the likelihood of a shortfall in USF funding. Conversely, because upward revisions do not create the likelihood of a shortfall in USF funding, upward revisions to the Form 499-Q cannot logically be considered to be prohibited by the FCC's order, and can be accepted at anytime.

deltathree argues that not accepting a downward revision of a Form 499-Q outside the 45-day revision period established by the FCC would "prevent carriers from manipulating the system by, among other things, reporting most of their revenue during quarters with the lowest contribution factor for the year and then reporting less of their revenue during quarters with higher contribution factors....To prevent carriers from being able to perform this kind of manipulation, the Commission created its outright prohibition on Form 499-Q revisions after the 45-day period."⁹ deltathree cites to no language in any FCC order supporting this proposition, thus, at best, USAC must treat this argument as advocacy by counsel for deltathree rather than an articulation of Commission thinking. It seems that a prohibition on upward revisions to a Form 499-Q by a USF contributor outside the 45-day revision window would lead to more detrimental "manipulat[ion] of the system" by encouraging a carrier to deliberately file a Form 499-Q underreporting revenue because the USF contributor would have no obligation to file a corrected form as it could argue that the 45-day revision period had passed. In effect, the USF contributor could systematically underreport revenue on its Form 499-Qs until it had to file the annual Form 499-A, thereby unfairly increasing the contribution burden on USF contributors that accurately report their revenues and who would then shoulder a larger proportion of ensuring the universal service support mechanisms had adequate funding each quarter.

In addition, given that it is the responsibility of the USF contributor to accurately and timely file forms, which the contributor certifies are accurate,¹⁰ it seems axiomatic that when a contributor (or USAC) discovers the contributor underreported its USF contribution obligation, the contributor should be able to file an upward revision to the form without a time prohibition.¹¹ If the FCC were to prohibit upward revisions of the Form 499-Q outside the 45-day revision period, then the contributor would effectively have a legally authorized free ride on the remainder of the USF contributor base until the April 1 annual Form 499-A filing and subsequent billing based on this form.

deltathree also argues that "[b]ecause the limitations the Commission provided on revisions to the Form 499-A serve different purposes than the limits to revise the Form 499-Q, it is not appropriate for USAC to rely on the Form 499-A rule to create a similar 499-Q policy, especially where such policies conflict with Commission precedent." USAC does not rely on the Form 499-A 12-month downward revision period/no upward

⁹ deltathree letter, 2.

¹⁰ See *supra* note 7.

¹¹ If the contributor files the annual Form 499-A or USAC estimates a Form 499-A filing for the contributor because the contributor did not make the 499-A filing, then the contributor need not file the Form 499-Q for the period in question.

revision period limitation¹² as justification for accepting upwardly revised Form 499-Qs beyond the 45-day Form 499-Q downward revision period, because there is no Commission prohibition on accepting upward revisions of the Form 499-Q at any time.

USAC Has No Authority to Accept Filed Forms That Downwardly Revise Reported Revenue Outside the Downward Revision Period

deltathree argues “[i]n the alternative, ...that the revisions submitted in its 499-Qs in October 2009 be cancelled as null and void.” These forms were submitted by deltathree in October 2009, which, as discussed above, was a date after each of the forms were due. In fact, and also as discussed above, deltathree had not made the required regulatory filings on the FCC-mandated due dates. deltathree now claims the forms it finally filed and certified as accurate were incorrect. The forms deltathree filed in October were used in determining deltathree’s USF contribution obligations for the first quarter of 2010. USAC has no authority to take the action requested by deltathree (effectively rejecting the forms), because to do so would result in downward revisions (back to the amounts USAC estimated for deltathree because it did not meet its original filing obligations) outside the Form 499-Q 45-day downward revision deadlines.¹³

For the foregoing reasons, the revised, certified November 2008, February 2009, May 2009 and August 2009 Form 499-Qs deltathree submitted in October 2009 were correctly accepted. deltathree’s request to have these forms declared null and void is hereby denied.

USF Contribution Obligation Adjustments Are Made as Part of the Annual Form 499-A True-Up Process

Please note that USAC will rely on the annual revenue reported on the 2010 Form 499-A to review deltathree’s 2009 USF contribution obligation, including the billings at issue in the appeal.¹⁴ Assuming but not concluding, that deltathree’s billings should be adjusted, it will receive adjustments or credits, as appropriate beginning in July 2010.

Pay and Dispute Policy

The FCC, in its *Comprehensive Review Order*,¹⁵ directed USAC to assess late fees on all unpaid balances. It is USAC’s policy to enforce any late payment fees associated with unpaid balances. It is the responsibility of the USF contributor to file correct revenue so

¹² See *Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review –Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, Order, DA 04-3669, 20 FCC Rcd 1012, ¶ 10, (2004) (*Revision Deadline Order*) (modifies Form 499-A Instructions to change deadline to file revised Form 499-A that would result in decreased contribution amounts).

¹³ *Supra* note 6.

¹⁴ See *Interim Contribution Methodology Order*, ¶ 36 (“USAC will use the actual revenue data provided by contributors on the FCC Form 499-A to perform annual true-ups to the quarterly projected revenue data submitted by contributors during the prior calendar year.”).

¹⁵ *Comprehensive Review Order*, ¶ 14, citing 47 C.F.R. § 54.713.

that USAC may accurately assess USF contribution obligations. Failure to pay USF contribution amounts when due will result in late charges being assessed on the amount outstanding.

deltathree states that it is unable to pay the invoiced amounts based on the revised contributions and it is only paying the portion related to its November 2009 Form 499-Q and its Form 499-A. USAC records indicate deltathree has not paid its balance due in full as of the April 2010 invoice. The FCC has stated in a recent order that contributors are not permitted to create self-help remedies by recalculating invoices with which they disagree and paying the recalculated amount.¹⁶ Thus, USAC wishes to advise deltathree that it will continue to receive late fees and penalties unless the amounts specified on the invoices issued by USAC are paid in full.¹⁷

The “Frequently Asked Questions” section of USAC’s website provides guidance that specifically advises contributors that intend to file revisions to pay charges or risk receiving late payment fees. In addition, the USAC website explains that USAC must rely on the contributor to deliver accurate information and that billings are based on the revenue as reported. The USAC website also explains that late payment fees will not be waived unless the dispute is determined to be the result of a USAC error.¹⁸

deltathree Request for Payment Plan

In its appeal, deltathree stated that “[b]ecause the payment of the remaining amount cannot be completed by the Company, deltathree is separately submitting a request to commence negotiations for a payment plan of this amount, pending resolution of this dispute.” USAC has addressed the USF contribution amounts owed by deltathree above. With regard to payment plans, deltathree should discuss its eligibility for and the terms of any payment plan with the FCC.

¹⁶ *In the Matter of Universal Service Contribution Methodology Emergency Request for Review of Universal Service Administrator Decision by Level 3 Communications, LLC, et al.*, Order, WC Docket No. 06-122, DA 10-187, 25 FCC Rcd 1115, ¶ 7 (rel. Jan. 29, 2010).

¹⁷ See *Comprehensive Review Order*, ¶ 16.

¹⁸ See USAC website section titled “Paying USAC Bill during Appeal Process” at: <http://www.usac.org/fund-administration/contributors/file-appeal/>.

Mr. Doug Orvis
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If you wish to appeal this decision, you may file an appeal with the FCC. Detailed instructions for filing appeals are available at:

<http://www.universalservice.org/fund-administration/contributors/file-appeal>

Sincerely,

USAC

cc: Regina Dorsey, FCC Office of Managing Director
Hillary DeNigro, FCC Enforcement Bureau
Trent Harkrader, FCC Enforcement Bureau
Erica Myers, FCC Wireline Competition Bureau


CERTIFICATE OF SERVICE

I, Kimberly A. Lacey, hereby certify that on this 27th day of May, 2010, a copy of the foregoing "Request for Review of Decision of the Universal Service Administrator by deltathree, Inc." in WC Docket No. 06-122 was served via hand delivery to the following parties:

Vickie Robinson
FCC Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
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Kimberly A. Lacey